6-2-1976

Francis E. Dunn, et al. v. Marshall County Hospital District of the County of Marshall, Kentucky; City of Benton, Kentucky; and County of Marshall, Kentucky

Reply Brief 1976-SC-0076

REPLY BRIEF

545 SW 2d 10

SUPREME COURT OF KENTUCKY

No. 76-76

FRANCIS E. DUNN, Et Al. - - - Appellants

versus

MARSHALL COUNTY HOSPITAL DISTRICT OF THE COUNTY OF MARSHALL, KENTUCKY;
CITY OF BENTON, KENTUCKY; and
COUNTY OF MARSHALL, KENTUCKY - Appellees

APPEAL FROM THE MARSHALL CIRCUIT COURT
HONORABLE JAMES M. LASSITER, JUDGE OF
MARSHALL CIRCUIT COURT

BRIEF FOR APPELLEES RESPONDING TO REPLY BRIEF FOR APPELLANTS, R. W. BLALOCK, J. B. CAHN, ROBERT HINES AND FRANK RILEY

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(See inside cover for Certification)

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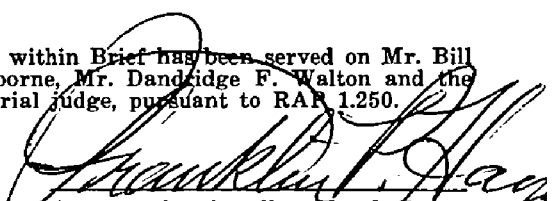
This is to certify that the within Brief has been served on Mr. Bill Cunningham, Mr. Earl T. Osborne, Mr. Dandridge F. Walton and the Hon. James M. Lassiter, the trial judge, pursuant to RAP 1.250.



Attorney for Appellee, Marshall County Hospital District of the County of Marshall, Kentucky

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Will the Marshall County Public Hospital District Corporation be acting as a governmental agency in connection with the issuance of bonds to finance the acquisition of an existing hospital and an addition to such hospital?

II.

Does the Marshall County Public Hospital District Corporation have the right, even if it is not acting as a governmental agency, to issue such bonds for such purposes?

SUPREME COURT OF KENTUCKY

No. 76-76

FRANCIS E. DUNN, Et Al. - - - *Appellants*

v.

MARSHALL COUNTY HOSPITAL DISTRICT OF THE COUNTY OF MARSHALL, KENTUCKY; CITY OF BENTON, KENTUCKY; and COUNTY OF MARSHALL, KENTUCKY - - *Appellees*

Response for Appellees, Marshall County Hospital District of the County of Marshall, Kentucky, City of Benton, Kentucky, and County of Marshall, Kentucky to the Reply Brief of the Appellants, R. W. Blalock, J. B. Cahn, Robert Hines, and Frank Riley.

May it please the Court:

PURPOSE OF THE BRIEF

The purpose of this brief is to show that Appellants, R. W. Blalock, J. B. Cahn, Robert Hines, and Frank Riley, cannot support their position taken in their Reply Brief to the effect that the proposed nonprofit corporation will not be "acting as a governmental agency" in connection with the issuance of bonds as that phrase is used in KRS 216.335 (7), and that even if it be assumed that they are right in such contention,

it will not make any difference in the result of this case, since if such statutory provisions did not exist, such a nonprofit corporation would have the right to finance the proposed project.

QUESTIONS TO WHICH BRIEF ADDRESSED

The only questions to which this brief is addressed are: (1) whether or not the proposed nonprofit corporation will be "acting as a governmental agency" and (2) even if it is not so acting, the right of such nonprofit corporation to issue the proposed bonds.

ARGUMENT

I.

The Proposed Nonprofit Corporation Will Be Acting as a Governmental Agency in Connection With the Issuance of the Bonds.

The Reply Brief of the Appellants, R. W. Blalock, J. B. Cahn, Robert Hines, and Frank Riley, deals with the single question of whether the Marshall County Hospital District is restricted to the single plan of issuing Hospital Revenue Bonds pursuant to the provisions of KRS 58. The entire argument presented is based on the contention that the proposed nonprofit corporation which is to issue the Bonds will not be "acting as a governmental agency for the construction and equipping of a hospital or hospitals, and the leasing of the same to the district." The contention is made that such nonprofit corporation is not a "governmental agency." However, the most important word

was not referred to and that is the word "acting." The question is whether or not the nonprofit corporation will be "acting" as a government agency for the construction and equipping of a hospital, even though it may *not be a governmental* agency.

Appellants made contention that the statute does not refer to the issuance of bonds by the nonprofit corporation but only to its acting as an agency for the "construction and equipping of a hospital." However, it is obvious that the construction and equipping of a hospital takes money. Certainly it is necessarily implied that the district can do what is necessary to finance the construction and equipping of a hospital. This includes its legal power to issue bonds.

It is also clear that if it issues the bonds and the District has the exclusive option to obtain title to the hospital facilities after the bonds are paid, the nonprofit corporation is "acting" as a governmental agency. It is obvious it is *acting* as a governmental agency since the interest on the bonds which it issues will be exempt from Federal Income Taxes under all rulings of the Internal Revenue Service. The basis for such rulings is that the nonprofit corporation is acting as a governmental agency. It does not have to be a governmental agency but only has to act as such. *Rev. Rul.* 63-20, 1963—1 C.B. 24.

II.

However, Even if It Be Admitted Only for the Sake of Argument, That the Nonprofit Corporation is Not Acting as a Governmental Agency in the Issuance of the Bonds, It is Clear That It is Not Necessary That There Be Authority Given by the Statutes for Such Nonprofit Corporation to Issue the Bonds Legally.

In the absence of any enabling legislation with reference to the issuance of bonds any municipal organization such as the Marshall County Hospital District has the right under a long line of judicial decisions in Kentucky to cause to be issued so-called "holding company" bonds. Two of such cases specifically approving the plan for the financing of hospital facilities are *Booth* v. *City of Owensboro,* 274 Ky. 325, 118 S. W. 2d 684, 275 Ky. 482, 122 S. W. 2d 111 (1938) and *Warren County* v. *Warren County Tuberculosis Sanitorium Corporation,* Ky., 272 S. W. 2d 331 (1954).

The only power that the District has to have is the power to obtain hospital facilities. Such powers are expressly given in KRS 216.335. Once this is admitted the District has the right to cause a "holding company" to be created and to cause it to take title to the properties to be improved, to issue bonds, to lease back the improved facilities to the District for a period of one year with the exclusive option in the District to renew such lease from year to year at such rentals, which if paid, will be sufficient to pay both the principal of and the interest on all of the bonds. Thus, in the *absence* of KRS 216.353 authorizing the District to issue rev-

enue bonds pursuant to KRS chapter 58 and in the absence of KRS 216.335 (7) authorizing the District to enter into contracts with a nonprofit corporation acting as a governmental agency for the construction and equipping of a hospital or hospitals and the leasing of the same to the District, it is clear that the Marshall County Hospital District would have the power pursuant to such decisions last cited to finance the contemplated project by the issuance of "holding company" bonds. The fact that KRS 216.353 states that bonds "may" be issued pursuant to Chapter 58 of Kentucky Revised Statutes in addition to all other methods provided by law does not take away the legal right of the District to issue so-called "holding company" bonds.

Appellants contend that KRS 216.353 in providing that hospital districts "may" issue revenue bonds pursuant to KRS chapter 58, "in addition to all other methods provided by law," means that before a method may be used other than Chapter 58, there must be a *statute* providing for the method, since nothing is "provided by law" unless there is a statute providing such method. They then argue that KRS 216.335 (7) in stating that the board which governs a hospital district may enter into contracts with a nonprofit corporation acting as a governmental agency for the construction and equipping of a hospital or hospitals and the leasing of the same to the district is not broad enough to authorize what is being contemplated.

In the Brief of Appellants, the contention was made that the "holding company" plan which has been ap-

proved by judicial decision in Kentucky cannot be used for the financing since this is not another method "provided by law," in that there is no statute authorizing the holding company plan. However, upon studying the four cases cited by Appellants on page 6 of the original brief upon behalf of Francis Dunn and others, it is clear that the first three are not in point and the fourth one *supports the position of Appellees.* Two of the cases relied on, namely *Fountain* v. *State,* 149 Ga. 519, 101 S. E. 294 and *In re: Campbell,* 138 Mich. 597, 101 N. W. 826 were *criminal* cases where the defendants were arguing that statutory provisions should be strictly construed with the result that "provided by law" should mean only if there was a specific statute on a certain matter. The case of *Lawson* v. *Kanawha County Court,* 80 W. Va. 612, 92 S. E. 786, is not in point because at page 789 of 92 Southeastern Reporter the court stated: "'The phrases 'prescribed by law' and 'provided by law,' when used in Constitutions, generally mean prescribed or provided by statues." Certainly if a Constitution refers to something being provided by law, it would be the intention of the framers of the Constitution to be referring to statutes passed by the legislature.

The only remaining case relied on by Appellants is *Pearsons* v. *Webster,* 17 R.I. 86, 20 A. 230, which not only does not support Appellants, but affirmatively supports the position of Appellees. In that case, the statute provided that whenever the appellant in any civil cause "shall have neglected to enter his appeal in the supreme court or court of common pleas within

the term *provided by law* for the entry of such appeal" (emphasis ours), the adverse party may have the judgment appealed from confirmed, by filing in the lower court a certificate signed by the clerk of the appellate court stating that the appeal was not entered within the term provided by law. The "law" provided that reasons of appeal should be filed ten days before the sitting of the court appealed to, but empowered the court appealed to, for cause shown, to permit the filing at any time during the term. The Appellant did not act within the ten day period generally provided by the statute, but did act within an extended time allowed by the appellate court on motion. The court stated that the term "provided by law" included the time fixed by the appellate court upon a motion having been made and an extended time having been given. Thus, the decision is a clear one to the effect that the phrase "provided by law" includes that which is provided by *judicial decision.*

In just the same way in the case at bar the identical words "provided by law" in KRS 216.353 as were contained in the statute involved in the *Pearsons* v. *Webster* case should be interpreted to include a decision of the Court of Appeals of Kentucky in just the same manner as a specific ruling of the highest court was considered in the *Pearsons* case.

Therefore, instead of the *Pearsons* case supporting the position of Appellants, it is a direct authority in support of the position of Appellees that the phrase in KRS 216.353 "provided by law" should be interpreted to include *law established by judicial decisions*

as well as that established by statute. There is *no law better established* in Kentucky than the legality of the "holding company" plan of financing.

However, even if KRS 216.353 were interpreted on the basis that "provided by law" means provided by statute, still the statute does not provide that the "holding company" plan of financing is *prohibited.* All KRS 216.353 says is that KRS 58 may be used by hospital districts "in addition" to methods "provided by law," which if interpreted to mean "provided by statute" would simply be a statement that in addition to other "statutory" methods the statutory method under Chapter 58 of Kentucky Revised Statutes could be used. Any municipal organization would still be free to use the "holding company" plan, since the statute referred to does not prohibit the use of such plan.

Apart from any of the foregoing there are two judicial decisions of Kentucky which clearly establish the right of the Marshall County Hospital District to use the holding company plan. These are *Warren County* v. *Warren County Tuberculosis Sanitorium Corporation, supra* and *White* v. *Common Council of City of Middlesboro,* Ky., 414 S. W. 2d 569 (1967).

In the first case the Court of Appeals approved the "holding company" plan to finance a tuberculosis hospital by a District Board of Tuberculosis Sanitorium Trustees for Warren County, which had been organized under Chapter 215 of Kentucky Revised Statutes in a very similar manner to the organization of the Marshall County Hospital District. Since the District Board of Tuberculosis Sanitorium Trustees

for Warren County was a governmental agency within the meaning of KRS 58.020 it would have had the power to issue revenue bonds under KRS 58, just as the Marshall County Hospital District has the power to issue revenue bonds under the same chapter. However, the Court of Appeals held that the holding company plan could be used in order to do the financing desired.

In the case of *White* v. *Common Council of City of Middlesboro, supra,* the Court of Appeals referred specifically to the fact that KRS 58 would have permitted the City of Middlesboro to have issued revenue bonds but referred to the holding company plan as also being available to the City of Middlesboro and stated as follows at page 570 of the *Southwestern Second Reporter:* "Moreover, the holding plan merely does indirectly that which the city could do directly," citing the case of *Skidmore* v. *City of Elizabethtown,* Ky., 291 S. W. 2d 3, which held that the City of Elizabethtown could issue parking revenue bonds under KRS 58. Furthermore there was a statute involved in that case identical in all material respects to the statute involved here, upon which Appellants are relying. In the case at bar the statute involved is KRS 216.353 which states that hospital districts may in addition to all other methods "provided by law" use Chapter 58 for revenue bond financing. In the White case the statute involved was KRS 82.050. It provided that a City such as Middlesboro might provide public off-street parking facilities and "may exercise any or all of the powers provided by KRS chapter 58." The same

section then stated as follows: "This authority herein contained shall be in addition to any other authority *granted to such cities by law,* and shall be an alternate plan for the acquisition of such facilities." (Emphasis ours.) The Court of Appeals referred specifically to this very section, KRS 82.050. The words "granted to such cities by law" in that section are in all material respects identical in meaning to the words "provided by law" in KRS 216.353. The effect of the decision is that the statutory provisions providing that KRS 58 may be used for revenue bond financing in addition to other methods "provided by law" does not mean that the Chapter 58 method is exclusive, but the "holding company" plan may be used. If the reasoning of Appellants in the case at bar had been followed in that case, the words of the statute "granted to such cities by law" would have prevented the use of the holding company plan in just the same manner that they argue in the case at bar that the words "provided by law" should prevent the use of the holding company method. Therefore, it is clear that under the Middlesboro case, it necessarily follows that the holding company plan may be used by the Marshall County Hospital District.

Counsel for Appellants at page 3 of his Reply Brief attempts to present an argument that the "holding company" plan should not be used because there might be foreclosure proceedings in case of a default in the payment of the bonds. It is to be noted that the Court of Appeals in *White* v. *Common Council of City of Middlesboro, supra* took special note of this, referring to its decision in *Baker* v. *City of Lexington,* Ky., 273

S. W. 2d 34 where the holding company plan for a swimming pool was approved and the identical argument was raised. The Court of Appeals held that this was not a valid argument. In referring to the Baker case the court in the Middlesboro case stated at page 570 of 414 Southwestern Second Reporter as follows: "We observed the possibility of loss was very remote."

CONCLUSION

Therefore, it is submitted that the right of the Marshall County Hospital District to use the holding company plan should be upheld on the basis that the holding company is "acting" as a governmental agency within the meaning of KRS 216.335 (7).

However, even if the Court should find that such holding company is not acting as a governmental agency, it is very clear that the case of *White* v. *Middlesboro, supra* is a decision directly in point to the effect that the holding company plan may be used where there is a statutory background involved in the case at bar which in all material respects is identical with that involved in the case of *White* v. *Middlesboro, supra.*

Respectfully submitted,

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